Montana Law Review

Volume 43
Issue 1 *Winter 1982*

Article 3

January 1982

Such Damages as Are Just: A Proposal for More Realistic Compensation in Wrongful Death Cases

R. Keith Strong
Partner, Church, Harris, Johnson & Williams

William D. Jacobsen
University of Montana School of Law

SUCH DAMAGES AS ARE JUST: A PROPOSAL FOR MORE REALISTIC COMPENSATION IN WRONGFUL DEATH CASES

R. Keith Strong* and William D. Jacobsen**

> In every action [for wrongful death] such damages may be given as under all the circumstances of the case may be just.[1]

I. INTRODUCTION

The lawyer who ventures into the realm of damages available to the estate and heirs of one who has been wrongfully killed sometimes feels as Alice must have when she walked through the looking glass. On every side are arbitrary rules. Distinctions visible to only the keenest eye take lawyer and client to vastly different results. One obvious example is the small difference between the two types of suit for death—the so-called "wrongful death" and "survival" actions. The survivors of a decedent who died instantaneously have a wrongful death action.[2] The deceased who happened to survive his injuries for an appreciable length of time leaves two lawsuits. The survivors have a wrongful death action; his own personal injury action survives his death to be prosecuted by the administrator of his estate.[3] This second action is called the survival action. The person is no less dead in either case, but if by chance death is slightly lingering the damages rules change. The survival suit has its own arbitrary rules. The vagaries of damages in the survival suit have been recently discussed.[4]

One facet of the law of damages in the wrongful death action is so peculiar that it bears examination. Survivors' damages are derivative only. They may not recover for the grief, mental anguish and emotional distress the wrongful act causes them regardless of how severe.[5] Damages in a wrongful death case are said to be computed by measuring the pecuniary loss caused the plaintiffs by the decedent's death. This "pecuniary loss" rule also applies in a suit over the wrongful death of a child or an elderly person who is not

---

* Partner with Great Falls law firm of Church, Harris, Johnson & Williams; J.D. with high honors, University of Montana School of Law, 1974.

** B.A., Stanford University, 1979; J.D., University of Montana School of Law, 1982.

1. MONTANA CODE ANNOTATED [hereinafter cited as MCA] § 27-1-323 (1981).
2. Dillon v. Great N. Ry. Co., 38 Mont. 485, 100 P. 960 (1909).
3. *Id.*
4. Smith, *Thoughts on the Survival Action in Montana and Related Matters*, 41 MONT. L. REV. 165 (1980).
5. Liston v. Reynolds, 69 Mont. 480, 500, 223 P. 507, 513 (1924).

making monetary contributions. Montana courts specifically refuse to compensate the heirs for their own grief. This article discusses that rule.

Grief, the mental and emotional anguish and shock accompanying the loss of a loved one, can be one of life's most traumatic experiences. The extensive effect of grief on physical and mental health has been the object of considerable medical and psychological research; as a result medical literature is filled with documentation of the physical and emotional damage caused by bereavement.[6] The devastating effects of bereavement are the theme for much of the world's great literature. Common sense and experience tell us the same thing. The profound physical and mental effect of grief is so obvious as to require no further discussion.

It seems that there would have to be a compelling justification for a rule of law that automatically denies everyone any recovery for their grief, even though the wrongful act of someone else caused it. This would seem particularly true when we recall that in the survival action administrators of the estates of decedents may recover for the mental and emotional distress of the dead person who is not even present to testify.[7]

A search for a justification for this rule of law leads to several places. One way to seek to understand the rule is to follow the development of Montana's law of damages in wrongful death actions. Another is to compare the losses Montana law does compensate with the reasons that have been advanced to support the Montana rule denying recovery for grief. It is also useful to consider whether any other jurisdictions allow damages of this nature. An examination of all these areas leaves one conclusion: the rule is an unnecessary relic of nineteenth century English social policy. The common law courts created it. It is time they changed it.

II. The Origin of the Rule

The Montana wrongful death statutes[8] do not distinguish between grief and any other type of damage the heirs may have suffered. The principal statute is Montana Code Annotated [hereinafter cited as MCA] § 21-1-323 (1981). It reads: "In every action [for wrongful death], such damages may be given as under all the circumstances of the case may be just." Montana has not allowed recovery of damages to be as unrestricted as the statute's wording

6. The National Library of Medicine's Index Medicus, January-June 1981 Supplement, alone, has 26 entries under the subject "grief."

7. Marinkovich v. Tierney, 93 Mont. 72, 86, 17 P.2d 93, 96 (1932).

8. MCA §§ 27-1-323, -512, -513 (1981).

would indicate. Montana follows what is called the pecuniary loss rule.[9] In doing so Montana, together with the majority of states in the United States,[10] has followed the English interpretation of Lord Campbell's Act,[11] that recovery for wrongful death is limited to what is called the pecuniary loss suffered by the survivors.[12]

Lord Ellenborough first said in *Baker v. Bolton*[13] that at the common law there could be no recovery for the wrongful death of a person. In 1846, the British Parliament enacted Lord Campbell's Act to change all that. It reads in pertinent part:

> [W]henever the death of a person shall be caused by wrongful act, neglect, or default . . . such as would have entitled the parties injured to maintain an action and recover damages in respect thereof, then and in every such case the person who would have been liable if death had not insued shall be liable . . . .
> [A]nd in every such action the jury may give such damages as they may think proportioned to the injury resulting from such death to the parties respectively for whom and for whose benefit such action shall be brought . . . .[14]

Lord Campbell's Act, like the Montana statute today, does not restrict the jury by imposing limits on how it computes these damages.

The English courts soon imposed their own limitations. The first and still leading case is *Ellen Blake v. The Midland Railway Co.*,[15] decided in 1852. John Blake was killed when two of the defendants' trains collided. The railroad company admitted liability; the case proceeded to trial to determine damages.[16] The trial judge instructed the jury that, although the plaintiff's primary loss was loss of support, the jury might also award her an amount to compensate the widow for her emotional pain.[17]

The appellate court reversed the resulting judgment for the plaintiff, holding that the jury had been improperly instructed on

---

9. MONTANA JURY INSTRUCTION GUIDE, Instruction 31.00, *Damages for Wrongful Death of an Adult.*

10. *See generally* 1 S. SPEISER, RECOVERY FOR WRONGFUL DEATH § 3:1 (2d ed. 1975) [hereinafter cited as SPEISER]. *See also* W. PROSSER, LAW OF TORTS 906-07 (4th ed. 1971) [hereinafter cited as PROSSER].

11. Act for Compensating the Families of Persons Killed by Accidents, 1846, 9 & 10 Vict., c. 93.

12. Blake v. Midland Ry., 118 Eng. Rep. 35 (QB 1852).

13. 170 Eng. Rep. 1033 (KB 1808). *See generally* 1 SPEISER, *supra* note 10, at §§ 1:1 through -:7. *See also* PROSSER, *supra* note 10, at 901-02.

14. 1846, 9 & 10 Vict., c. 93.

15. 118 Eng. Rep. 35 (QB 1852).

16. *Id.*

17. *Id.* at 41.

damages and that any award for Mrs. Blake's suffering was improper. The court stated, "The title of this Act may be some guide to its meaning: and it is 'An Act for Compensating the Families of Persons Killed;' not for solacing their wounded feelings . . . ."[18] The court decided that damages are limited to those "admitting of a pecuniary estimate."[19] The court gave few reasons. It said that the Act provides for a wrongful death action, not one for survival; it does not continue the decedent's personal injury action but provides an entirely different remedy.[20] The court seemed to believe that any other rule would be impossible for the jury to follow:

> [T]he measure of damages is not the loss or suffering of the deceased, but the injury resulting from his death to his family. This language seems more appropriate to a loss of which some estimate may be made than to an indefinite sum independent of all pecuniary estimate to soothe the feelings . . . .
>
> We conceive that the Legislature would not have thrown upon the jury such great difficulty in calculating and apportioning the solatium to the different members of the family without some rules for their guidance.[21]

The *Blake* case was subsequently followed in the majority of American jurisdictions.[22] From this one case arose two rules: damages in a wrongful death action are limited to the pecuniary loss of the survivors, and there is no recovery for the mental anguish of the survivors.

III. The Reasons for the Rule

Only one reason is advanced for the rule. No recovery can be given for the mental anguish of the survivors because a jury cannot estimate that sort of damage. One of the cases most frequently cited for that notion, an 1874 Colorado case, *Kansas Pacific Railway Co. v. Miller*,[23] provides this rationale:

> [U]pon what known principle can the mental sufferings of the survivors be estimated. If the family is large, and the grief proportioned to its size, then the damages would be immense. If the family was small but the grief boundless, how could it be composed. How could a jury estimate the relative mental anguish of a widow and twelve children. Furthermore, it would involve a min-

18. *Id.* at 42.
19. *Id.* at 43.
20. *Id.*
21. *Id.*
22. *See* 1 Speiser, *supra* note 10, at § 3:52.
23. 2 Colo. 442 (1874).

> ute scrutiny into the personal relations of all parties. Affection would have to be measured by a graduated scale. An account would have to be taken of the familiarity which existed between the deceased and the survivors. If a confirmed drunkard, or a person of vile associations, the grief at his departure might not be so poignant.
>
> If the widow had wearied of her lord, or the husband of his wife, death might be a joy instead of an anguish. How determine the duration of this mental suffering or the degree of its intensity? When a large number of survivors were found, an inquiry would have to be instituted into the feelings of each. This certainly might, in many instances tend to scandal and disgrace. Neither the interests of the litigants nor the policy of the law could be subserved by such a course. None of these difficulties are encountered in estimating the mental suffering in the case of one suing for direct injuries to himself; his relations to others are in no sense material; it is a personal, not a relative, suffering.[24]

The gist of the argument seems be that grief cannot be measured, much less proved. Therefore, no recovery will be attempted.

This belief that the jury cannot measure the survivors' mental suffering traces its origins to the first decision on the subject, *Blake v. Midland Ry. Co.*,[25] in which the court stated:

> There may be a calculation of the pecuniary loss sustained by the different members of the family from the death of one of them but if the jury were to proceed to estimate the respective degrees of mental anguish of a widow and twelve children for the death of the father of the family, a serious danger might arise of damages being given to the ruin of the defendants.[26]

Both the *Blake* and *Miller* cases confine the plaintiffs to recovery for only lost contributions. These two cases provide the only rationale for the rule; this reasoning will be examined in a subsequent section. Montana, without any justification at all, followed the same approach in *Soyer v. Great Falls Water Co.*,[27] when first faced with the question.

IV. The Rule in Montana

Montana subscribes, at least in theory, to the pecuniary loss rule[28] and specifically refuses to compensate for grief.[29] The pecu-

24. *Id.* at 465-66.
25. 118 Eng. Rep. 35 (QB 1852).
26. *Id.* at 41-42.
27. Soyer v. Great Falls Water Co., 15 Mont. 1, 37 P. 838 (1894).
28. *See e.g.*, Sanders v. Mount Haggin Livestock Co., 160 Mont. 73, 89-90, 500 P.2d

niary loss rule today, however, is considerably broader than it might sound. It includes not only the dollar contributions the survivors might have received, but also a monetary award for some of the intangible losses caused them by the decedent's death. The tangible losses include support and services, which are easily translated into a dollar value. The less tangible losses stray far from the strict limitations placed on damages by the *Blake* case.

A. *The Development of the Rule*

The Montana Supreme Court has decided a number of cases dealing with the measure of damages for wrongful death. The court has not handled the question consistently. If a trend exists, however, it seems to be toward approving awards for a wider range of losses in wrongful death actions and granting the jury more discretion in computing the damages. It is useful to follow the development of the cases in Montana to see what basis the pecuniary loss rule has in public policy.

In one of the earliest wrongful death cases, *Soyer v. Great Falls Water Co.*,[30] the trial court refused to permit the plaintiff to prove the age of the decedent and that he was the husband and father of the surviving heirs.[31] The Montana court reversed, holding: "The measure of damages is the amount which the deceased would probably have earned during his life for their [plaintiffs'] benefit, taking into consideration his age, ability, and disposition to work, and his habits of living and expenditures . . . ."[32] The court did not explain its ruling. It appeared to follow strictly the *Blake* rule. The opinion contains no hint that there might be a recovery for anything beyond mere contributions or support.

In 1908 the United States Court of Appeals for the Ninth Circuit predicted, in *Butte Electric Ry. Co. v. Jones*,[33] that Montana would "award damages as a pecuniary compensation only, and could not take into consideration the grief of the son, nor make any allowance for solace to him."[34] The court allowed no recovery for the son's mental anguish at his mother's death, but introduced new elements of damage beyond simple monetary contributions. The case was a son's action for the wrongful death of his mother.

397, 406 (1972).

29. Liston v. Reynolds, 69 Mont. 480, 500, 223 P. 507, 513 (1924).
30. 15 Mont. 1, 37 P. 838 (1894).
31. *Id.* at 5, 37 P. at 839.
32. *Id.*
33. 164 F. 308 (9th Cir. 1908).
34. *Id.* at 311.

The son had quit school in the eighth grade and left home to work as "a house boy or steward" living in his employers' homes. The court let the jury consider evidence that the plaintiff's mother had intended to provide further education for her son, even though he had quit school. The court also allowed the jury to consider the value of the home his mother had provided, even though plaintiff had left it.[35]

The next three cases to reach the Montana court were decided within four months of each other, and all adopted a broader measure of damages than their predecessors. The court further expanded the pecuniary loss rule beyond actual contributions.

The first case was *Hollingsworth v. Davis-Daly Estates Copper Co.*,[36] in which the court approved an instruction that did not limit damages to contributions but allowed the jury to "consider any loss of comfort, society or protection of a father and husband, . . . if it was of money value, you may allow pecuniary compensation."[37] Without citing authority, the Montana court expanded the scope of damages beyond the *Blake* rule. The court implied, however, that there could be a loss of comfort, society or protection without a pecuniary loss.

In *Mize v. Rocky Mountain Bell Telephone Co.*,[38] the same issue was raised. The court ruled that the plaintiff could recover for the pecuniary loss, "if any," caused by losing her husband's comfort, protection, society and companionship.[39] Again the court implied that a jury may find these losses to have no pecuniary value.

The third case, *Dillon v. Great N. Ry. Co.*,[40] traces the lineage of Montana's wrongful death act back to Lord Campbell's Act. It distinguishes between a wrongful death suit and a survival action and reaffirms recovery in a wrongful death action for "the loss of companionship and the like."[41]

After these three cases Montana seemed committed to an expanded version of the pecuniary loss rule. None of the cases, however, discuss recovery for grief. The question does not appear to have been raised.

Then the court, two months after *Dillon*, decided *Yergy v. He-*

35. *Id.* at 310-11.
36. 38 Mont. 143, 99 P. 142 (1909).
37. *Id.* at 162, 99 P. at 149.
38. 38 Mont. 521, 100 P. 971 (1909).
39. *Id.* at 534-35, 100 P. at 974.
40. 38 Mont. 485, 100 P. 960 (1909).
41. *Id.* at 493, 100 P. at 962.

lena Light & Ry. Co.,[42] Montana's most bizarre opinion in this area of law. The court did not fault the damage instructions limiting recovery to contributions, because there had been no objection.[43] The court refused to rule that the verdict was the result of passion and prejudice, since it was within the range of the evidence offered at trial.[44] The court was shocked by the verdict's size, however, and went out on its own to find out what had happened: "In this particular case we have felt justified, in view of the circumstances and the fact that the information we seek is contained in public records made by the plaintiff herself, and easily accessible, in pursuing an extrajudicial inquiry . . . ."[45] The court then used what it discovered in its own investigation to reduce the verdict:

> The result of this litigation will be that the sum recovered by the plaintiff as executrix will simply be added to the fortune of which she will come into possession when the estate is settled, and at her death will go to persons who were in no way dependent upon Mr. Yergy in his lifetime . . . .[46]

The rule of the case seems to be that the court will not allow a verdict to stand if the survivors are otherwise cared for. To date this approach has not been repeated, but there are hints that the court is concerned with seeing that non-dependent survivors do not receive a windfall.[47]

In the following several years the Montana court continued to apply the measure of damages outlined in *Hollingsworth* and *Mize*.[48] One case, *Gilman v. C.W. Dart Hardware Co.*,[49] was an action by parents for the wrongful death of an 18-year-old daughter. The court held that the parents should be allowed recovery for contributions they might have received from their daughter after her majority, even though the jury would have to speculate to compute those losses:

> In estimating the pecuniary value of this child to her next of kin, the jury could take into consideration all the probable, or even possible, benefits which might result to them from her life, modified as in their estimation they should be, by all the chances of

42. 39 Mont. 212, 102 P. 310 (1909).
43. *Id.* at 241-42, 102 P. at 319-20.
44. *Id.* at 242, 102 P. at 320.
45. *Id.* at 242-43, 102 P. at 320.
46. *Id.* at 243, 102 P. at 320.
47. *See e.g.*, Harrington v. H. D. Lee Mercantile Co., 97 Mont. 40, 33 P.2d 553 (1934), in which the court stated, "It is not the policy of the law that the tragedy resulting in [decedent's] death should endow her heirs." *Id.* at 65, 33 P.2d at 560.
48. *See e.g.*, Neary v. Northern Pacific Ry., 41 Mont. 480, 506, 110 P. 226, 236 (1910).
49. 42 Mont. 96, 111 P. 550 (1910).

failure and misfortune. There is no rule but their own good sense for their guidance . . . .[50]

The *Gilman* case does not allow the jury to compensate the parents for their own suffering. It recognizes that the pecuniary loss rule requires the jury to speculate.

In the next two cases, the court reviewed verdicts returned under instructions that limited recovery to contributions only. In both cases, the instructions were given without objection, and the court did not comment on their propriety.[51] In 1923,[52] the court held that wrongful death recovery encompasses compensation for "loss of comfort, protection and companionship as well as for loss of support," even though plaintiff had only asked for an instruction on damages for loss of support.[53]

Then came *Liston v. Reynolds*.[54] Without citing authority, the court approved the trial court's instruction in a wrongful death case brought by the father of a 20-year-old son: "They were further instructed that they could not allow plaintiff any damages for mental anguish, grief, or suffering, or loss of companionship and association with the deceased . . . ."[55] The court was siding with the majority of jurisdictions when it held, for the first time, that there is no recovery for grief in Montana. However, the court gave no explanation for so holding. It also apparently reversed itself and denied recovery for companionship and association, even though it had earlier allowed such recovery.[56] The court used its new rule to reduce the verdict.[57]

In the next series of cases, however, the *Liston* holding on recovery for loss of companionship seems to have been forgotten. Reviewing a verdict for the parents of a seven-year-old boy in *Burns v. Eminger*,[58] the court affirmed an award including recovery for loss of comfort. Again it held that the speculative nature of awards is no objection:

[A]ny award must, of necessity be based upon conjecture and

---

50. *Id.* at 100, 111 P. at 551.

51. Hall v. Northern Pacific Ry., 56 Mont. 537, 546-47, 186 P. 340, 343-44 (1919). Hollenback v. Stone & Webster Engineering Corp., 46 Mont. 559, 570, 129 P. 1058, 1061 (1913).

52. Anderson v. Wirkman, 67 Mont. 176, 215 P. 224 (1923).

53. *Id.* at 188, 215 P. at 228.

54. 69 Mont. 480, 223 P. 507 (1924).

55. *Id.* at 501-02, 223 P. at 513.

56. Mize v. Rocky Mountain Bell Telephone Co., 38 Mont. 521, 534-35, 100 P. 971, 974 (1909); Hollingsworth v. Davis-Daly Estates Copper Co., 38 Mont. 143, 162, 99 P. 142, 149 (1909).

57. Liston, 69 Mont. at 502, 223 P. at 513.

58. 84 Mont. 397, 276 P. 437 (1929).

> surmise, and any amount of testimony would be of little aid to the jury. The matter must be left largely to the judgment and common sense of the ordinary jury left to decide it . . . . To hold that, without such direct evidence [of specific pecuniary loss] no recovery beyond nominal damages could be had, would render nugatory the statute permitting a recovery for wrongful death . . . as applied to the loss of a child of tender years . . . .[59]

A short time later, a federal court applying Montana law followed the rule set out in *Mize*,[60] allowing recovery for society and comfort and adding two new elements—"care" and "advice"—to the list of items the jury may consider.[61]

Later cases clarified some details of how the pecuniary loss rule works. For example, there is only *one* action for wrongful death, regardless of the number of survivors.[62] Counsel may use the "per diem" approach to argue damages.[63] The court specifically ruled that economic testimony is admissible to prove future earnings, even though the testimony may be speculative in nature.[64] And it reaffirmed the right to recover for loss of society, comfort, protection and companionship.[65]

The implication of earlier cases that there might be no pecuniary loss even though there was a loss of comfort, society and protection had an effect in a series of cases in the late 1960s. In one, *Miller v. Boeing Co.*,[66] a federal court apparently reduced a verdict in part because "[t]here was no attempt to show any facts which might tend to establish a pecuniary value for the loss of comfort, society and protection . . . ."[67] The *Miller* court believed that specific proof must be made of the pecuniary value of these intangible losses. The precedential value of that decision, however, was eliminated when the Montana Supreme Court held in 1968:

> [A]s to the third item, loss of society, comfort, care and protection . . . no extensive proof was made except that the son was a normal child. It is obvious that to put a monetary value on this is something solely within the province of the jury.[68]

---

59. *Id.* at 411-12, 276 P. at 443.
60. Hennessey v. Burlington Transport Co., 103 F. Supp. 660 (D. Mont. 1950).
61. *Id.* at 665.
62. State *ex rel.* Carroll v. District Court, 139 Mont. 367, 370, 364 P.2d 739, 741 (1961).
63. Wyant v. Dunn, 140 Mont. 181, 187, 368 P.2d 917, 920 (1962).
64. Krohmer v. Dahl, 145 Mont. 491, 496-97, 402 P.2d 979, 982 (1965).
65. Davis v. Smith, 152 Mont. 170, 174, 448 P.2d 133, 135 (1968); Sanders v. Mount Haggin Livestock Co., 160 Mont. 73, 89-90, 500 P.2d 397, 406 (1972).
66. 245 F. Supp. 178 (D. Mont. 1965).
67. *Id.* at 182.
68. Davis v. Smith, 152 Mont. 170, 174, 448 P.2d 133, 135 (1968).

The rule appears to be that once the jury has speculated their award will stand.

The extent of the jury's discretion was outlined in *Davis v. Smith*,[69] a case which illustrates the inadequacy of the pecuniary loss rule. The jury returned an award of $4,000 for the wrongful death of a 15-year-old boy. Funeral expenses alone were $1,605. The district court had granted a new trial because the verdict was "ridiculously low";[70] the supreme court reversed. Determining the value for the loss of society, comfort, care and protection was held to be "solely within the province of the jury."[71] Since the jury's verdict was in excess "of the actual, determinable and nonspeculative damages," it would not be disturbed.[72] Apparently, a new trial would be proper only if no award was made at all beyond the actual, determinable, nonspeculative damages.[73]

A few landmarks are visible in this fog of cases. Montana's pecuniary loss rule started out denying recovery for all losses except specific pecuniary contributions. However, the recovery rules have been broadened. The survivors may recover damages for some of the intangible losses they have suffered. The courts rely upon the good sense of the jury and allow it to speculate about probabilities and even possibilities. But the jury is forbidden to listen to the survivors testify about their own suffering and evaluate that loss. Economists may predict the future earnings of deceased children but their parents may not tell of the specific emotional problems the loss has caused them, regardless of how severe. Just how sharp is the line between these two kinds of losses and the evidence which supports each? The answer requires an examination of the specific elements of loss now compensable in Montana.

B. *The Elements of Wrongful Death Damages*

Over the years the Montana court has identified a number of specific elements of damages that are allowed in death actions as compensation for pecuniary loss. This section examines the elements of loss which are classified as pecuniary and, therefore, compensable in wrongful death cases.

Certain damages awarded under Montana law, such as funeral

69. 152 Mont. 170, 448 P.2d 133 (1968).
70. *Id.* at 172-73, 448 P.2d at 134.
71. *Id.* at 174, 448 P.2d at 135.
72. *Id.* at 178, 448 P.2d at 137.
73. *See* Putnam v. Pollei, 153 Mont. 406, 457 P.2d 776 (1969) (a survival action, where a plaintiff's verdict for only the value of the deceased's personal belongings was reversed as not supported by the evidence, since there was no award for lost earning capacity).

expenses and loss of support, obviously fit within the concept of compensation for pecuniary loss. Some elements, such as loss of services, can be readily translated into pecuniary terms by referring to the cost of hiring such services. Other elements of compensable damages, such as loss of society, comfort and companionship, strain the idea of pecuniary loss beyond the bounds of common sense and logic.

1. *Medical and Funeral Expenses*

It has been held that the survivors of a decedent may recover funeral and medical expenses which result from a wrongful death, provided the expenses are reasonable.[74] This element of damages requires no explanation and is clearly in accordance with the concept of compensating a pecuniary loss incurred by the decedent's survivors.

2. *Support, Maintenance, Contributions*

Damages for loss of support, maintenance or contribution aim at compensating those survivors who could reasonably have expected to receive financial support from the decedent, had he lived, but who will be deprived of that support by his death.[75] Damage awards of this type also fit logically within the concept of providing relief for a pecuniary loss suffered by the decedent's survivors. This is the measure of damages that *Blake* allows.

Montana has long recognized recovery for loss of support in wrongful death cases.[76] Indeed, these damages are at the heart of the typical wrongful death case; in fact they may constitute the lion's share of a recovery. Support "includes all the financial contributions that [a] decedent would have made to his dependents had he lived."[77] Most often, damages for loss of support are computed simply by looking at the earning potential of the decedent at the time of his death and calculating what the survivors could have expected to receive from his future earnings.[78]

In determining the amount to be awarded for loss of support, the jury may consider a variety of factors, including the decedent's "capacity to earn money, his age at death, his disposition to work, his habits of life and living, and his own expenditures,"[79] as well as

74. Hennessey v. Burlington Transport Co., 103 F. Supp. 660, 665 (D. Mont. 1950).
75. *See* 1 SPEISER, *supra* note 10, at § 3:5.
76. *See* Soyer v. Great Falls Water Co., 15 Mont. 1, 5, 37 P. 838, 839 (1894).
77. 1 SPEISER, *supra* note 10, at § 3:5.
78. *Id.* §§ 3:5, 3:6.
79. Hollingsworth v. Davis-Daly Estates Copper Co., 38 Mont. 143, 162, 99 P. 142, 148

the probable life expectancies of the decedent and his survivors.[80] In Montana, moreover, a plaintiff seeking compensation for loss of support is apparently not limited to a general formula for recovery; rather, it seems that he may receive compensation for the loss of specific types of support contributions, if proven. For example, it has been held that a survivor may recover the costs of a college education by proving that the decedent had the intent and ability to provide for that education.[81]

3. *Services*

Damages for wrongful death are not limited to the recovery of a decedent's actual cash contributions. Another element easily understood in economic terms is "services." Compensation for pecuniary loss has been held to encompass the value of the "personal services" that a decedent would have rendered to his survivors,[82] such as "work . . . in the household."[83] As usual, the loss of services is compensable only to the extent that it can be assigned a pecuniary value. "The fair and reasonable value of the services . . . is the proper criterion in estimating the damages."[84]

Theoretically, damage awards for loss of services do fit within the *Blake* concept of providing relief for a pecuniary loss. However, some less tangible losses have been called services. Their value may be recovered under Montana law, even though they are difficult to measure by any pecuniary standard. For example, compensation is allowed for the value of providing "instruction,"[85] "protection,"[86] "advice"[87] and "a good home."[88] While these services are undoubtedly valuable, and properly compensable, it strains common sense to squeeze them into a system which purports to compensate only pecuniary losses.

4. *Society, Comfort, Companionship*

Finally, Montana allows the award of damages to survivors for the loss of society, comfort and companionship suffered because of

---

(1909).

80. *Id.*

81. Butte Electric Ry. v. Jones, 164 F. 308, 310-11 (9th Cir. 1908).

82. Hennessey v. Burlington Transport Co., 103 F. Supp. 660, 665 (D. Mont. 1950).

83. *Id.*

84. 1 SPEISER, *supra* note 10, at § 3:46.

85. Neary v. Northern Pacific Ry., 41 Mont. 480, 506, 110 P. 226, 236 (1910).

86. Mize v. Rocky Mountain Bell Telephone Co., 38 Mont. 521, 535, 100 P. 971, 974 (1909).

87. Hennessey v. Burlington Transport Co., 103 F. Supp. 660, 665 (D. Mont. 1950).

88. Butte Electric Ry. v. Jones, 164 F. 308, 311 (9th Cir. 1908).

the decedent's death.[89] Damages of this type seek to compensate the survivors for the decedent's love, affection and care of which they are deprived.[90] In proving damages of this type, evidence centers on the nature of the relationship between the decedent and his survivors. "Harmonious marital or family relations between the parties involved should be shown, as well as common interest in hobbies, scholarship, art, religion, social activities, and the like."[91]

Damages of this type simply cannot be harmonized with the central concept governing damages for wrongful death, that only pecuniary losses are compensable. The Montana court, however, continues to insist that all losses, even loss of society, comfort and companionship, may be compensated only to the extent they have a pecuniary value. As the court stated in *Sanders v. Mount Haggin Livestock Co.*:[92]

> It is not possible to measure in exact terms of money the loss which a surviving husband, wife, or child may have sustained through being deprived of the comfort and society of the deceased spouse or parent . . . . But, in fixing the amount, the jury is always bound by the fundamental rule that pecuniary damage is the limit of recovery . . . .[93]

It is with damages of this last type that the pecuniary loss requirement becomes most strained. Society, comfort and companionship are inherently valuable but inherently without pecuniary measure. It makes no sense to limit juries to considering these items of damages in such a strained fashion. In allowing damage awards for lost affections, the courts recognize that the emotional impact of a wrongful death should be compensated. However, by clinging to the traditional measure of pecuniary loss, the courts have assured that damages for lost society, comfort and companionship will be awarded illogically and inadequately. By refusing to consider the actual emotional damage to the survivors and the impact on their lives, the courts deprive the jury of the concrete evidence to measure the loss. The traditional rules governing damages for wrongful death should, therefore, be changed.

V. The Future of the Rule

The pecuniary loss rule allows survivors to recover only their

89. Mize v. Rocky Mountain Bell Telephone Co., 38 Mont. 521, 535, 100 P. 971, 974 (1909).

90. *See* 1 Speiser, *supra* note 10, at § 3:49.

91. *Id.* at § 3:50.

92. 160 Mont. 73, 500 P.2d 397 (1972).

93. *Id.* at 90, 500 P.2d at 406.

derivative losses. They may not recover for their own personal damage. A jury can speculate about the future contributions to the parents of a two-year-old and the pecuniary value of such a vague concept as "protection." A jury can reduce the value of moral training to a dollar sum. Nonetheless, juries cannot compensate the survivors for their mental anguish, no matter how great or even disabling. No compelling policy justifies this result. The rule has only historical support, without logical or policy foundation. Juries may be ignoring it. The rule has been abandoned in other jurisdictions, and there is no reason why Montana should not do the same.

A. *Only History Supports the Rule*

There is no doubt that the pecuniary loss rule, with its corollary that grief is not compensable, is the majority rule and has been since the *Blake* case. But history alone does not justify a rule of law that serves no purpose.

The *Blake* case's underpinnings have disappeared with time. Survival statutes have been enacted in most jurisdictions to continue the decedent's own personal injury action after his death.[94] Montana's own survival statute was adopted in 1867, just 15 years after the *Blake* case was decided.[95] More significantly, the social policies that may once have seemed to require such a rule no longer exist. Those policies were traced by the Supreme Court of Michigan in *Wycko v. Gnodtke*,[96] a case involving the death of a 14-year-old boy. The Michigan court said:

> The rulings reflect the philosophy of the times, its ideals, and its social conditions. It was the generation of debtor's prisons, of some 200 or more capital offenses, and of the public flogging of women. It was an era when ample work could be found for the agile bodies and nimble fingers of small children.
>
> This then, was the day from which our precedents come, a day when employment of children of tender years was the accepted practice and their pecuniary contributions to the family both substantial and provable . . . .
>
> That this barbarous concept of the pecuniary loss to a parent from his child should control our decisions today is a reproach to justice. We are still turning, actually, for guidance in decision, to "one of the darkest chapters in the history of childhood." Yet in other areas of law the legal and social standards of 1846 are as

94. *See* PROSSER, *supra* note 10, at 900. *See also* 2 SPEISER, *supra* note 10, at Appendix A (for a listing of various survival statutes).

95. MCA § 27-1-501 (1981).

96. 361 Mich. 331, 105 N.W.2d 118 (1960).

> dead as the coachman and his postilions who guided the coaches of its society through the dark and muddy streets, past the gibbets where still hung the toll of the day's executions.[97]

Nonetheless, the *Blake* rule, known as the pecuniary loss rule, continues in effect. In Montana today a jury may award damages for the pain, suffering, and mental and emotional distress of a person who is dead but none for the similar anguish of those who are still alive. What is the justification for continuing the rule?

Montana's Supreme Court has not hesitated to change the common law when it believed doing so was in the public interest.[98]

The obsolescence of the rule is perhaps best summarized by the following quotation from a federal district court in Louisiana:

> The distinction between the pain of a broken arm and the pain of a broken heart is judge-made. It must be doubted that a jury deemed competent and able to evaluate the exquisite anguish of a compound fracture of the femur would find it more difficult to fix just compensation for a cup filled with a widow's tears.
>
> Human experience, as well as the literature of psychiatry and psychology bear abundant evidence of the debilitating effect of grief and the resultant depression. It is certainly no less real, and no more difficult to appraise, than the mental and physical pain and suffering attendant upon personal injury that is awarded to those who survive, or the pain and suffering prior to death that is recoverable as part of the death action here.[99]

However, the court there did not address one critical fact. A common law rule can be changed by common law courts.

Chief Justice Haswell's eloquent dissent in *Consolidated Freightways v. Osier*,[100] discussing a different common law rule, is appropriate here:

> The source of the rule . . . is the English common law . . . . Being a rule of common law it is purely judge-made law. Judges created the rule by judicial decision and judges can change it in the same manner . . . . This approach is now as extinct as the dodo.

---

97. *Id.* at 335-37, 105 N.W.2d at 120-21.

98. *See e.g.*, Brandenburger v. Toyota Motor Sales, U.S.A., Inc., 162 Mont. 506, 513 P.2d 268 (1973) (adopting strict liability in tort); Kussler v. Burlington N., Inc., ___ Mont. ___, 606 P.2d 520 (1980) (allowing inquiry into the intent with which a general release was given); Corrigan v. Janney, ___Mont.___ 626 P.2d 838 (1981) (overruling previous holdings that the "repair and deduct" statute precludes a landlord's liability for condition of premises).

99. *In re* Sincere Navigation Corp., 329 F. Supp. 652, 656 (E.D. La. 1971), quoted in 1 SPEISER, *supra* note 10, at § 3:55.

100. Consolidated Freightways v. Osier, ___ Mont. ___, 605 P.2d 1076, 1082 (1979) (contributions among joint tortfeasors).

> Montana's 1972 Constitution guarantees access to the courts to all persons and speedy recovery afforded for every injury of person, property or character. Art. II, Sec. 16, 1972 Mont. Con. When the reasons for the rule no longer exist the rule itself fails. Section 1-3-201, MCA.[101]

Judicial change of judge-made law is not new in Montana.

The wrongful death statute itself specifies only that such damages may be recovered as are just.[102] This rule starting with *Blake* and *Miller,* and continuing through *Soyer* and *Liston* in Montana, is one of court creation. Just as courts have created the rule, so they can change it when it is outmoded. Here, in the archaic refusal to compensate for grief, is further need for the court to act.

B. *Other Jurisdictions Allow Recovery for the Mental Anguish of Survivors*

It is not impossible to compensate the survivors for their grief. Not all jurisdictions follow the pecuniary loss rule. One court has stated:

> The existence of mental suffering by a parent for the loss of a child is a fact so universal and general that it also may be fairly assumed and recognized as existing . . . . The extent of the distress and sorrow may not be susceptible of direct or exact measurement, but enough certainty and knowledge of the situation can be established through the same introduction of testimony, to furnish the basis for a verdict or judgment.[103]

A number of jurisdictions do allow compensation for mental anguish,[104] and include Arkansas, Florida, Kansas, Maryland and West Virginia, as well as Louisiana and the countries of France, Switzerland, Turkey, and Japan.[105]

C. *Juries Regularly Evaluate Mental Anguish*

Juries today evaluate and award damages for mental anguish. In the routine personal injury action in Montana the damages include an award for the mental anguish the injury causes.[106] The tort of intentional infliction of emotional distress is now widely

---

101. *Id.*
102. MCA § 27-1-323 (1981).
103. Graham v. Western Union Telegraph Co., 109 La. 1069, 1074, 34 So. 91, 93 (1903).
104. 1 SPEISER, *supra* note 10, at § 3:53.
105. *Id.* at § 3:54.
106. MONTANA JURY INSTRUCTION GUIDE, Instruction 30.01, *Damages for Mental, Physical Pain, and Suffering.*

Montana Law Review, Vol. 43 [1982], Iss. 1, Art. 3
recognized.[107] The importance of compensating people for mental anguish wrongfully caused them has led two states, California[108] and Hawaii,[109] to recognize an entirely new tort. There, juries are allowed to evaluate damages for negligently inflicted emotional distress, even though the plaintiff is not otherwise injured. The California Supreme Court has stated: "[T]his is a matter of proof to be presented to the trier of fact. The screening of claims on this basis at the pleading stage is an usurpation of the jury's function."[110] Those states allow anyone to recover for emotional distress caused by negligence, even if no physical injury occurs. In doing so, they go far beyond the approach this article advocates—allowing recovery for negligently inflicted grief and emotional distress only when the negligence results in a wrongful death.

In Montana, in a combined wrongful death and survival action, the survivors may come forward in a survival case to prove and recover (through the deceased's estate) for the mental and emotional anguish of the deceased. They may prove in the death case all of the details of their own relationship with the deceased to establish their loss of society, protection, comfort, companionship, care and advice. And there, the pecuniary loss rule stops them. They may not prove their own suffering, though it is their right which creates the wrongful death suit in the first place. All of the facts which the *Blake* and *Miller* courts thought were impossible to prove are regularly being evaluated by juries, but not in wrongful death cases. The result is that, in those cases, serious injuries go uncompensated.

D. *Juries May Be Ignoring the Rule*

A further reason exists for abandoning the traditional rule. Juries often ignore the rule when its application seems unfair. The result is an arbitrary system, unfair to litigants. As Prosser noted:

> This has been particularly [apparent] in the case of death of a minor child, where the future is in the highest degree speculative and uncertain. As any parent is well aware, any realistic view of the prospects must mean that the cost of rearing the child will far exceed any conceivable pecuniary benefits that might ever be optimistically expected of him; and damages calculated on this basis could never be anything but a minus quantity. Nevertheless, in

---

107. *See e.g.*, extensive case citations in 38 AM. JUR. 2d *Fright, Shock and Mental Disturbance* § 4 (1968); RESTATEMENT (SECOND) OF TORTS § 46(1).

108. Molien v. Kaiser Foundation Hospitals, 616 P.2d 813, 167 Cal. Rptr. 831 (1980).

109. Rodrigues v. State, 52 Hawaii 156, 472 P.2d 509 (1970).

110. Molien, 616 P.2d at 821, 167 Cal. Rptr. at 839.

> such cases substantial verdicts have been sustained, where it is very evident that the jury have taken the bull by the horns, and in reality have compensated for the prohibited sentimental aspects of the family relation, with the court benevolently winking at the flagrant violation of the rule it has laid down. There have been similar cases as to aged decedents, already past the hope of future earnings and contributions. Such decisions do not appear very likely to command respect for the administration of justice; but it seems evident that it is the theory which is wrong, and not the result.[111]

There are several cases in Montana, all involving youthful decedents, which bear out Dean Prosser's observations. It is apparent that Montana juries will ignore the rule when it seems unjust.

In *Hollenback v. Stone & Webster Engineering Corp.*,[112] the Montana court sustained a verdict of $18,000 in favor of a mother for the death of her 19-year-old son. In *Autio v. Miller*,[113] the court held that a verdict of $15,000 was not excessive compensation for the death of an eight-year-old boy. And, in *Wyant v. Dunn*,[114] a case involving the wrongful death of a five-year-old boy, a verdict of $15,195 was upheld. In each of these cases, the compensation awarded the survivors clearly exceeded the pecuniary contributions they could have expected from the decedent. In each case, the pecuniary loss rule was just as clearly ignored by all—the jury, the trial judge and the appellate court.

There are other cases in which the rule requiring pecuniary loss is more strictly followed. For instance, in *Liston v. Reynolds*,[115] a verdict of only $5,500 was held excessive compensation for the death of a 20-year-old. The court reduced the damage award to $3,000. In *Davis v. Smith*, a $4,000 award including $1,605 of funeral expenses was affirmed.[116] It is in this type of case, where the phrase "pecuniary loss" is closely followed, that the inequities of the pecuniary loss limitation become apparent. Where only meager sums are awarded for the most grievous of injuries, the real losses of the decedent and his survivors go uncompensated. If a just result can be obtained only by ignoring the law, it is time to change the law.

---

111. PROSSER, *supra* note 10, at 908-09.
112. 46 Mont. 559, 129 P. 1058 (1913).
113. 92 Mont. 150, 11 P.2d 1039 (1932).
114. 140 Mont. 181, 368 P.2d 917 (1962).
115. 69 Mont. 480, 223 P. 507 (1924).
116. 152 Mont. 170, 448 P.2d 133 (1968).

E. *The Rule Violates Basic Public Policy*

Montana has recognized the worth of the individual as a basic principle. The Montana Constitution in Article II, Section 4 provides: "The dignity of the human being is inviolable . . . ."[117] Article II, Section 16 commands: "Courts of justice shall be open to every person, and speedy remedy afforded for every injury of person, property or character."[118] Our statutes say: "Everyone is responsible, not only for the result of his willful acts, but also for an injury occasioned to another by his want of ordinary care of skill in the management of his property or person . . . ."[119] This combination of constitutional and statutory language has recently persuaded the Montana court to remove several restrictions on plaintiff's rights to prove their injuries.[120] No argument has been raised that the mental and emotional anguish of grief is not an injury. Nonetheless, our common law refuses to compensate that injury. Such a rule may have been appropriate in nineteenth century England. It is out of place in twentieth century Montana.

VI. CONCLUSION

The rule preventing recovery for grief has no justification aside from an old English pedigree. It prevents injured people from recovering for their injuries. Juries regularly evaluate similar injuries. It is not necessary to revise the law totally. A rule that allows survivors bringing wrongful death cases to prove all damages flowing from the death would certainly be fair. It would eliminate artificial distinctions and realistically compensate people who have been injured.

---

117. MONT. CONST. art. II, § 4.
118. MONT. CONST. art. II, § 16.
119. MCA § 27-1-701 (1981).
120. *See e.g.*, cases cited *supra* note 98, and Madison v. Yunker, ___ Mont. ___, 589 P.2d 126 (1978) (eliminating requirement of a demand for retraction before filing a libel suit); Hayes v. Aetna Fire Underwriters, ___ Mont. ___, 609 P.2d 257 (1980) (recognizing suit for bad faith in adjusting and processing Workers Compensation claim).